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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE AND L. L. GARVIN,
PETITIONERS,

vs.

NORTH SHORE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1942.

[fol. 1]

[File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 393-J Civil

H. T. Overstreet, M. E. Nowlin, J. F. Booth, J. A. Lang, Isadore Barnett, R. Brazle, N. Lang, Jr., Amos Harris, N. W. Smith, R. S. Simmons, L. L. Garvin, W. R. Stewart, F. C. Smith and G. A. Pereira, Plaintiffs,

vs.

The North Shore Corporation and the Bay Shore Water & Light Company, Both Florida Corporations, Defendants

Complaint—Filed September 26, 1941

Plaintiffs, H. T. Overstreet, M. E. Nowlin, J. F. Booth, J. A. Lang, Isadore Barnett, R. Brazle, N. Lang, Jr., Amos Harris, N. W. Smith, R. S. Simmons, L. L. Garvin, W. R. Stewart, F. C. Smith and G. A. Pereira, of Duval County, Florida, sue the North Shore Corporation and the Bay Shore Water & Light Company, both Florida Corporations, with their principal places of business in Jacksonville, Duval County, Florida and allege:

1. This action arises under the Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. Code, Title 29, Sections 201-219, as hereinafter more fully appears. Jurisdiction is conferred on this Court by Section 41 (8), Title 28, U. S. Code, giving the District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce."

2. That the defendants, North Shore Corporation and the Bay Shore Water & Light Company are corporations [fol. 2] organized and existing under and by virtue of the laws of the State of Florida, the defendant, North Shore Corporation is the owner and operator of the toll road connecting with the U. S. Highway No. 17, an arterial highway from Jacksonville, Florida to New York City and points north, that the said toll road operated by the North Shore Corporation connects U. S. Highway No. 17 with Ft. George

Island and the intercoastal waterway, which is crossed by the said toll road at Sisters Creek by a draw bridge, also owned, controlled, and operated by the North Shore Corporation as an integral part of said road. That the said toll road is the only means of land communication between Ft. George Island and the rest of the United States. That said road is extensively used by vehicular traffic from points outside the State of Florida to points on said toll road and beyond said toll road and by vehicular traffic from points on said toll road and beyond said toll road to points outside of the State of Florida for hire, that is to say, for a toll or fee. That said road is an integral part of the highway system of the United States. That on Ft. George Island there are located two large clubs whose membership mostly consist of people from states other than the State of Florida who use the said toll road in interstate commerce for hire. That there is a large winter colony on Ft. George Island whose residents come from states other than the State of Florida who use the said toll road in interstate commerce for hire. That on the said road and accessible by land only over the said road are located several fishing camps renting boats, cabins and serving meals that are frequented by the public and are used extensively by visitors from [fol. 3] Georgia, South Carolina and other nearby state who use the said road in interstate commerce for a toll or fee. That the residents and visitors along said road and at Ft. George Island receive mail and parcels from other states over the said road. That the U. S. Post Office Dept. uses the said road for the purpose of delivering mail from states other than the State of Florida to the visitors and residents along the road and on Ft. George Island and its environs. That Sisters Creek is an integral part of the intercoastal canal from Miami to New York. That the said waterway is constantly used in interstate commerce by pleasure craft and freight vessels between Florida and Northern States. That the defendant, the North Shore Corporation operates a draw bridge over the said intercoastal canal which is constantly raised and lowered to permit the passage of boats engaged in interstate commerce. That the said draw bridge is an integral part of the said toll road. That from time to time boats stop at the dock at Sisters Creek Camp to replenish their supplies or have supplies delivered to them from Jacksonville, Florida, and to pick up passengers or discharge passengers; and fur-

ther that on the said toll road and at New Berlin and at Eastport are located several retail stores or stands who purchase various commodities including groceries, oil, fuel, liquors, beer, wearing apparel and other kinds of merchandise for resale to the public. That many of the said commodities sold and offered for resale to the public by the said stores or stands were and are commodities manufactured or produced in states other than the State of Florida, and some were manufactured and produced and resold to the public by the merchants on said toll road in their original packages which were produced in states other than the State of Florida. That the said toll road is used in inter-[fol. 4] state commerce for the delivery of the above stated commodities and others to the said merchants. That the said toll road is the shortest route to both Eastport and New Berlin and that the said road is used for a toll or fee for the delivery of said goods at New Berlin and Eastport over said road, all of which services are performed over the road of the defendant, the North Shore Corporation for hire.

That the Bay Shore Water & Light Company is a subsidiary of the North Shore Corporation and is owned and controlled by the same interest, that it renders certain services to- in connection with the said toll road operated by the parent corporation, the defendant, the North Shore Corporation. That the services of the employees of these two corporations are so interrelated and interchangeable that it is impossible to separate them for the purposes of this suit. That the Bay Shore Light & Water Company owns and controls a telephone line connecting with the Southern Bell Telephone & Telegraph Company at Jacksonville, Florida, over which the residents and visitors of Ft. George Island and its environ- may make and do make long-distance calls, to all parts of the United States and Europe for hire, which telephone line is operated and maintained by the employees of the North Shore Corporation, that the said telephone line is a public service and is used by the public at large for a toll charge. That it is also used in interstate commerce by the Western Union Telegraph Company and the Postal Telegraph Company to render telegraph service to those residing at Ft. George Island and its environs. For the use of this line the said telegraph companies pay to the Bay Shore Water & Light Company

a toll of twenty-five cents per message for all messages transmitted over lines of the Bay Shore Water & Light Company. That the said toll road and the said telephone line have been since the effective date of the Fair Labor [fol. 5] Standards Act of 1938, to-wit: October 29, 1938, and to the date of the filing of this suit daily used in interstate commerce as aforesaid.

3. During the work week beginning the 24th day of October, 1938, and up to and including the time of the filing of this complaint, the defendant, the North Shore Corporation, has employed approximately fifteen men in the maintaining and operating a toll road over which vehicular traffic in interstate commerce passed for monetary consideration to the defendant, the North Shore Corporation and was also operating and maintaining a public telephone line engaged in interstate commerce for a monetary consideration to the defendant, the Bay Shore Water & Light Company.

4. That the plaintiff, H. T. Overstreet, was employed by the defendant, the North Shore Corporation from the effective date of the Fair Labor Standards Act to April 15, 1939, and M. E. Nowlin was employed by the defendant, the North Shore Corporation, from April 15, 1939, to the date of the filing of this complaint, both employees were employed as the operators of the draw bridge on the toll road operated by the defendant, the North Shore Corporation. The said draw bridge crossed Sisters Creek, a part of the intercoastal canal and interstate waterway between New York and Miami; and it became and was their duty to raise and lower said bridge to allow boats to pass under said bridge, many of the boats being operated in interstate commerce daily. That the said H. T. Overstreet and M. E. Nowlin were subject to call to raise and lower the said draw bridge twenty-four hours a day but were actually on duty sixteen hours a day, allowing time for sleep between the times that boats passed through said draw bridge during the perion plaintiffs, H. T. Overstreet and M. E. Nowlin worked for the defendant, the North Shore Corporation in interstate commerce, the North Shore Corporation failed [fol. 6] and refused to compensate the plaintiffs, H. T. Overstreet and M. E. Nowlen, for such employment at a rate of not less than twenty-five cents an hour for forty-four hours a week and 37½¢ an hour for all overtime that

the said plaintiffs, H. T. Overstreet, and M. E. Nowlin, worked each week, this being the minimum rate provided by the Fair Labor Standards Act. The employment of the plaintiffs, H. T. Overstreet and M. E. Nowlin, at such a wage was in violation of Section VI and VII of the Act.

5. That the plaintiff, J. F. Booth, from the date of the Fair Labor Standards Act until the date of the filing of this complaint, was an employee of the North Shore Corporation and was employed as foreman of the maintenance work on the said toll road and the said telephone line as more fully set out in Paragraph 2. That he performed the duties of foreman of the maintenance division of both of the defendant corporations daily and that his services were essential to the use of the said toll road and telephone line in interstate commerce as more fully set out in Paragraph 2.

6. That the plaintiffs, J. A. Lang, Isadore Barnett, R. Brazle, Amos Harris and N. Lang, Jr., are laborers who were employees of the North Shore Corporation and the Bay Shore Water & Light Company. That their duties while such employees consisted of maintenance work on said toll road, that is to say, repairing the road and repairing the bridges which were integral parts of said toll road, that their services were essential to the use of the said road in interstate commerce and that the said road was used in interstate commerce as above stated. That their further duties consisted of erecting the telephone lines and poles of the Bay Shore Water & Light Company, and maintaining and repairing the said telephone lines and poles of the Bay [fol. 7] Shore Water & Light Company, and maintaining and repairing the said telephone lines and poles and that their services were essential to the use of the said telephone line in interstate commerce as more fully set out in Paragraph 2. That the aforesaid duties were performed by the said plaintiffs daily during their said employment.

7. That N. W. Smith, R. S. Simmons, L. L. Garvin, W. R. Stewart, F. C. Smith, G. A. Pereira and M. E. Nowlin were employees of the North Shore Corporation and that their services and duties consisted of selling tickets to and collecting from vehicles using the said toll road in interstate commerce as aforesaid, and that their further duties consisted of collecting telephone tolls and making long-distance connections with the Southern Bell Telephone & Telegraph

Company, to states other than the State of Florida and otherwise operating the said telephone line of the Bay Shore Water & Light Company, however, their entire remuneration was paid by the North Shore Corporation. That their services were essential to the operation of the said toll road and that the said toll road and the said Bay Shore Water & Light Company were operating in interstate commerce as more fully appears in Paragraph 2 in this Complaint and that the said plaintiffs were therefore engaged in interstate commerce.

8. That the plaintiff, H. T. Overstreet, was employed as alleged in Paragraph 4, beginning from the effective date of the Fair Labor Standards Act, April 15, 1939, at a regular wage of $90.00 a month.

That the plaintiff, M. E. Nowlin, was employed as alleged in Paragraph 4, beginning from the 15th day of April, 1939, to the date of the filing of this complaint at a regular wage of $100.00 a month.

[fol. 8] That the plaintiff, J. F. Booth, was employed as alleged in Paragraph 5, from the effective date of the Fair Labor Standards Act until the date of the filing of this complaint at a regular weekly wage of $25.00 a week. That the plaintiff worked approximately, at varying times, from 54 to 84 hours a week.

That the plaintiffs, Isadore Barnett, N. Lang, Jr., J. A. Lang and Amos Harris, were employed as alleged in Paragraph 6, from the effective date of the Fair Labor Standards Act until the date of the filing of this complaint, at a rate from October 24, 1938, until about the 1st day of November, 1939, at a regular wage of twenty-five cents per hour and from or about the 1st of November, 1939, to about the 1st of April, 1941, at a regular wage of seventeen and one-half cents an hour and from or about the 1st of April, 1941, to the date of the filing of this complaint at a regular wage of thirty-two cents an hour. That during the years of 1938, 1939, 1940 and a part of 1941, the said employees worked about 55 hours a week.

That the plaintiff, N. W. Smith, was employed as alleged in Paragraph 7, beginning at the date of the Fair Labor Standards Act until the date of the filing of this complaint at a regular wage of $50.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, R. S. Simmons, was employed as alleged in Paragraph 7, beginning at the 1st of October, 1940, and continues working to this date, at a regular wage of $30.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, L. L. Garvin, was employed as alleged in Paragraph 7, beginning at the date of December 14, [fol. 9] 1940, and continues working to this date, at a regular wage of $30.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, W. R. Stewart, was employed as alleged in Paragraph 7, beginning at the date of January, 1940, to the 1st of September, 1940, at a regular wage of $30.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, F. C. Smith, was employed from the effective date of the Fair Labor Standards Act as alleged in Paragraph 7, until February 1, 1940, at a regular weekly wage of $12.00 and worked 96 hours a week. That from February 1, 1940, until May 1, 1941, he was employed at a regular weekly wage of $12.00 a week and worked approximately 84 hours a week.

That the plaintiff, G. A. Pereira, was employed as alleged in Paragraph 7, beginning March, 1940, at a regular weekly wage of $12.50 a week until the 1st of October, 1940, and from October, 1940, until the date of filing this complaint at a weekly wage of $20.00 a week and worked 84 hours a week.

That the plaintiff, N. E. Nowlin, was employed as alleged in Paragraph 7, from the effective date of the Fair Labor Standards Act until the 15th day of April, 1939, at a regular monthly wage of $55.00 per month and worked 84 hours a week.

That the plaintiff, R. Brazle, was an employee of the defendants from the date of the Fair Labor Standards Act until or about the 1st of August, 1940. That he was employed until on about November 1, 1940 at a rate of pay of twenty-five cents an hour and from November 1, 1940, until the 1st of August, 1940, at a regular wage of twenty-seven and one-half cents an hour. That he worked approximately 55 hours a week.

[fols. 10-12] 9. That all of the said plaintiff employees were paid less than the rate specified by Section VI and VII

of the Fair Labor Standards Act of 1938, and the said employees did not receive overtime compensation as prescribed by the Fair Labor Standards Act. And defendants are liable to plaintiffs for plaintiffs' unpaid minimum wages and overtime compensation and an additional equal amount as liquidated damages, and in addition, a reasonable attorneys' fee and costs of this action.

Wherefore, plaintiffs demand judgment against the North Shore Corporation and the Bay Shore Water & Light Company, for the amount of plaintiffs' unpaid overtime compensation, and an additional equal amount as liquidated damages, together with a reasonable attorneys' fee and costs of this action.

John W. Lee, Attorney for Plaintiffs, 601 Fla. Theatre Bldg.; Dillon Hartridge, Attorney for Plaintiffs, 601 Fla. Theatre Bldg.

[fol. 13] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title omitted]

MEMORANDUM ON MOTION TO DISMISS—Filed October 31, 1941

The Fair Labor Standards Act provides that employees engaged in interstate commerce or in the production of goods for commerce shall be paid the minimum wage and shall be paid time and a half for overtime. It does not provide that employees engaged in a business that affects interstate commerce, or in an instrumentality used by others for interstate commerce, shall be paid the minimum wage or time and a half. The employees in this case were maintaining a toll road. Neither the employees nor the employer were engaged in interstate commerce under the decision of the United States Supreme Court in DETROIT BRIDGE COMPANY vs. TAX BOARD, 294 U. S. 83. In the latter case the bridge company was operating an international toll bridge from Michigan to Canada and claimed an exemption from taxation of the annual franchise tax of the State of Michigan. The Michigan Statute exempted from the tax the "capital or surplus of any corporation

represented by property used exclusively in interstate commerce." The bridge company contended that since it main- [fol. 14] tained a toll bridge over which interstate and foreign commerce traveled no tax would be due under the exemption above quoted. The Supreme Court in the above-cited case quoted approvingly the following language from the case of COVINGTON & CINCINNATI BRIDGE CO. vs. KENTUCKY, 154 U. S. 204:

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, *because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge.*" (Italics supplied.)

It is difficult to find clearer language. The question involved is whether the road company, and consequently its employees, was engaged in interstate commerce. If it were, the Fair Labor Standards Act would apply. If it were not, it could not apply. There is no distinction between a toll bridge and a toll road. The Supreme Court of the United States has held that the operators of a toll bridge were not engaged in interstate commerce. This decision is, of course, binding on this Court.

Congress had the power to have provided that those engaged in operation of a facility used by others in interstate commerce would be subject to regulation, but Congress did not so provide. The Court cannot legislate.

I consider the drawbridge merely a component part of the toll road. It was put there for the use of the highway and not for the use of a canal or river.

I am of the opinion, however, that the employees of the defendant engaged in the maintenance and operation of the [fol. 15] telephone line, while so engaged, were under the Fair Labor Standards Act.

In view of the numerous motions, interrogatories, and objections to interrogatories, pending, the Court is of the opinion that the motion to dismiss the complaint should be, and the same is hereby, sustained, with leave to the plaintiffs to file an amended complaint in behalf of the employees engaged in maintenance and operation of the telephone line, and that only interrogatories pertinent to issues in such complaint as amended be propounded to

defendants, and that the plaintiffs have twenty days from the date hereof in which so to amend, and that the defendants shall have twenty days thereafter in which to file their defensive pleadings.

Curtis L. Waller, United States District Judge.

October 30, 1941.

[fol. 16] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDMENT TO COMPLAINT—Filed November 6, 1941

Comes now the plaintiffs, by and through their attorney, and amend the Complaint filed in the above entitled cause in the following particulars, to-wit:

By striking the name of the plaintiff, R. Brazle, from the first line of Paragraph Six of the Complaint and adding to the end of Paragraph Six the following:

"That R. Brazle was an employee of the North Shore Corporation engaged in the business of maintaining and repairing the said toll road and repairing the bridges which were integral parts of the said toll road and that his services were necessary to the maintenance and use of the said toll road in interstate commerce."

By striking the name of the plaintiff, L. L. Garvin, from the first line of Paragraph Seven and adding to the end of Paragraph Seven the following, to-wit:

"That L. L. Garvin was an employee of the North Shore Corporation engaged in selling toll tickets and collecting toll tickets from vehicles using said toll road in interstate commerce and that his duties were necessary to the use and maintenance of the said road in interstate commerce."

John W. Lee, Dillon Hartridge, Attorneys for Plaintiffs.

We do hereby consent to the above amendments to the [fols. 17-18] Complaint filed in the above entitled cause.

Smith & Axtell, by W. Gregory Smith, Attorneys for Defendants.

[fols. 19-26] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DISMISSING COMPLAINT—Filed November 10, 1941

The cause coming on to be heard and it appearing to the Court that the plaintiffs, H. T. Overstreet, L. L. Garvin and R. Brazle are unable to amend the complaint in pursuance to the Court's order and the Court being fully advised in the premises;

It Is Hereby Ordered and Adjudged that the complaint in the above styled cause be, and the same is hereby dismissed as to the plaintiffs, H. T. Overstreet, L. L. Garvin and R. Brazle.

Done and Ordered at Tampa, Florida, on the 8th day of November, A. D. 1941.

Curtis L. Waller, Judge.

[fol. 27] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10184

H. T. OVERSTREET, et al., Appellants,

versus

NORTH SHORE CORPORATION, et al., Appellees

In Forma Pauperis

Appeal from the District Court of the United States for the Southern District of Florida

Before Hutcheson, Holmes, and McCord, Circuit Judges

OPINION OF THE COURT—Filed May 28, 1942

HOLMES, Circuit Judge:

The North Shore Corporation owns and operates a toll road that lies wholly within the bounds of Duval County, Florida. The road connects U. S. Highway No. 17, and crosses the Intercoastal Waterway, a navigable stream, by means of a draw-bridge. It is traversed by vehicles in [fol. 28] interstate and intrastate commerce, is used as a route for mail deliveries, and the drawbridge is in frequent

operation to permit passage of vessels moving in interstate and foreign commerce along the Intercoastal Waterway. Appellants are three employees of the corporation *whose duties are, respectively, to tend the draw-bridge, to collect tolls from users of the road, and to repair and maintain the road.* The sole question for decision is whether these employees are engaged in commerce within the meaning of Sections VI and VII of the Fair Labor Standards Act. 29 U. S. C. A., Sec. 206, 207.

In view of the legislative history of the Act and the precise language in which it is drafted, the courts have considered it plain that Congress did not intend for the phrase, "engaged in commerce", to be expanded by construction to embrace employees engaged in the performance of duties merely affecting, burdening, or obstructing interstate commerce; and decisions under other and broader legislation enacted by Congress pursuant to the power to regulate commerce have no application here.[1] Our inquiry, therefore, is whether these employees, tested by the character of the services they performed, actually were engaged in interstate commerce.[2]

We think the decision of the Supreme Court in the case of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, which was followed by a unanimous court in the case of *Detroit Bridge Co. v. Tax Board*, 294 U. S. 83, is decisive of the narrow issue here presented. In the *Henderson Bridge* case it was held that a company owning and operating a toll bridge that was used exclusively for interstate traffic was not engaged in interstate commerce; that only those [fols. 29-37] who used the bridge and paid the tolls were engaging in interstate commerce. The *Detroit Bridge* case held that the ownership and operation of a bridge spanning the Detroit River between the United States and Canada did not constitute engaging in foreign commerce. In both cases the bridges involved crossed navigable streams.

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[1] Federal Trade Commission v. Bunte Bros., 312 U. S. 349; Jewell Tea Co. v. Williams, 118 F. (2) 202; Jax Beer Co. v. Redfern, 124 F. (2) 172; Swift & Co. v. Wilkerson, 124 F. (2) 176.

[2] Jax Beer Co. v. Redfern, 124 F. (2) 172; Swift & Co. v. Wilkerson, 124 F. (2) 176; Baggett v. Henry Fischer Packing Co., 37 Fed. Supp. 670; Fleming v. A. B. Kirschbaum Co., 38 Fed. Supp. 204.

On the authority of these decisions, we hold that these appellants were not engaging in interstate commerce and were not within the coverage of the Fair Labor Standards Act. If the North Shore Corporation, the employer, was not engaging in interstate commerce by virtue of owning and operating the toll road, certainly those employees whose duties consisted in executing the business of the company were not engaging in interstate commerce. The judgment entered below dismissing the complaint is

Affirmed.

[Petition for rehearing was denied, without opinion, June 30, 1942.]

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 12, 1942

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. Enter Lucien H. Boggs. File No. 46,785. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 284. H. T. Overstreet, R. Brazle and L. L. Garvin, Petitioners, vs. North Shore Corporation. Petition for a writ of certiorari and exhibit thereto. Filed August 7, 1942. Term No. 284 O. T. 1942.